COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1101

CHRISTOPHER G. LIBERTINI

vs.

COMMISSIONER OF REVENUE.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The taxpayer appeals from a decision of the Appellate Tax Board (ATB) that disallowed certain deductions that he had taken, as business expenses, on his 2012 and 2013 Massachusetts income tax returns. The taxpayer maintains a family residence in Massachusetts and has several jobs, but his principal occupation is as a professor of history at Dominican College (Dominican), in Orangeburg, New York. The ATB ruled that the taxpayer's "tax home" was accordingly in New York, and that the taxpayer could not deduct his expenses incurred in traveling to, and living in, New York.

We affirm the ATB's decision disallowing the deduction of New York travel expenses. However, the expenses the taxpayer incurred in traveling from New York to Massachusetts, for his other employment in Massachusetts, should be deductible if

properly raised and substantiated, and we accordingly remand to the ATB to address that issue.

Background. The taxpayer maintains a multifamily residence in Lowell, which is the home of his wife and two children. In 2006 he began working as a professor at Dominican. Each school year he signed a one-year contract, with the school year running from August to August. The taxpayer's responsibilities at Dominican included teaching four classes per semester, holding office hours, advising students, attending faculty meetings, and serving as coach of the debate team. In 2012 the taxpayer became the coordinator of Dominican's history department. In that role the taxpayer managed a department staff of at least six faculty, designed course schedules, and resolved student complaints within the department.

The taxpayer's schedule was that during the school year he would drive from Lowell to New York at the beginning of each week, live in New York during the week, and then return to Lowell on the weekends. He did not work in New York in the summer months. In 2006 the taxpayer purchased a condominium in New York, and lived there during the week. The taxpayer was obligated to be on the Dominican campus twenty hours per week, but estimated that he was actually on campus more hours. He also did university work at his condominium, for example, planning lessons and answering e-mail.

In addition to his Dominican job, the taxpayer had three other sources of income in 2012 and 2013: (1) he worked one weekend each month, and two additional weeks per year, in the Army National Guard, at Fort Devens, Massachusetts; (2) he was a teaching assistant for the Harvard Extension School -- this work was done remotely, and did not require travel to Massachusetts; and (3) he was a landlord for the other units in his multifamily residence in Lowell. The ATB expressly found, however, that the taxpayer's main source of income was his Dominican job, and that the majority of the taxpayer's work time was spent on his Dominican tasks.

The taxpayer filed Massachusetts resident income tax returns for 2012 and 2013. In each year he deducted as business expenses the costs of working in New York -- this included travel costs, meals, and the cost of the condominium and its mortgage. The Department of Revenue (DOR) disallowed the deductions and assessed an additional tax for 2012 of $1,649.53, and for 2013 $2,198.61. On appeal the ATB ruled that the deductions were properly disallowed, because the taxpayer's tax home under G. L. c. 62, § 2 (d) (2), was New York, and thus the taxpayer could not deduct the costs of living in New York. The taxpayer appeals.

Discussion. The question is what expenses incurred while traveling for business are properly deductible as business

expenses. Under G. L. c. 62, § 2 (d) (2), taxpayers may deduct from their gross income:

> "An amount equal to the deductions allowed by Part IV of the [Internal Revenue] Code which (i) consist of expenses of travel, meals and lodging while away from home, or expenses of transportation paid or incurred by the taxpayer in connection with the performance by him of services as an employee."

Part IV of the Federal tax code, in turn, provides for the deduction of expenses for travel, meals, and lodging as follows:

> "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business including . . . (2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business; . . .
>
> "For purposes of paragraph (2), the taxpayer shall not be treated as being temporarily away from home during any period of employment if such period exceeds 1 year."

26 U.S.C. § 162(a) (2012 & Supp. V 2017).

To qualify for deduction under these sections, the expenses must be (1) reasonable and necessary expenses, (2) incurred while away from home, and (3) incurred while in pursuit of a trade or business. See Andrews v. Commissioner of Internal Revenue, 931 F.2d 132, 136 (1st Cir. 1991).[1] The critical issue here is whether the taxpayer was away from home when he was working in New York. The Federal Tax Court has held that a

[1] In construing provisions of the Massachusetts tax code that incorporate Federal provisions, we follow the interpretation of the Federal law. Grady v. Commissioner of Revenue, 421 Mass. 374, 380 (1995).

taxpayer's "tax home" is the location of his principal place of business, not his personal residence. Mitchell v. Commissioner of Internal Revenue, 74 T.C. 578, 581 (1980). See Andrews, supra. The United States Court of Appeals for the First Circuit has stated that the purpose behind the away from home expense deduction is "to mitigate the burden upon a taxpayer who, because of the exigencies of his trade or business, must maintain two places of abode and thereby incur additional living expenses" (citation omitted). Id. at 135. A taxpayer cannot, however, claim the expense deduction where he has chosen to live in one place and work permanently in another. See Mitchell, supra at 584 n.7; Tucker v. Commissioner of Internal Revenue, 55 T.C. 783, 786 (1971). The expenses must arise from an exigency or "business necessity," not from "personal choice." Andrews, supra at 137.

Although a taxpayer's "tax home" is generally his or her "principal place of business," there is an exception to that rule when the taxpayer relocates for a business assignment that is only "temporary." Id. Under the statute, however, "the taxpayer shall not be treated as being temporarily away from home during any period of employment if such period exceeds 1 year." 26 U.S.C. § 162(a) (2012 & Supp. V 2017).

Accordingly, to resolve whether the deduction was proper, the ATB had to address two separate issues: first, which

location should be deemed the taxpayer's principal place of business for tax purposes, where the taxpayer worked in two separate locations; and second, even assuming that New York would qualify as the taxpayer's principal place of business in 2012 and 2013 because that is where he did the preponderance of his work, could his work in New York nevertheless qualify as temporary, such that his tax home remained in Massachusetts during those years. We address each issue in turn.

2. Taxpayer's principal place of business. When a taxpayer has a place of business in two or more locations, courts have asked where "most of [the taxpayer's] work was performed," to determine his principal place of business. Montgomery v. Commissioner of Internal Revenue, 64 T.C. 175, 179 (1975). The test is heavily fact dependent. Factors courts have looked at include the "length of time spent engaged in business at each location," as well as the "relative portion of the taxpayer's income derived from each place." Andrews, 931 F.2d at 138 & n.10. Here the ATB addressed the facts in detail, noting that during the approximately eight-month school year the taxpayer spent the weekdays working in New York, and that his Dominican responsibilities were "extensive." The ATB specifically found that collectively, the taxpayer's other jobs did not "occupy an equivalent amount of his time." The ATB also found that the taxpayer's Dominican job was his main source of

income, and that the evidence showed that Dominican accounted for considerably more than fifty percent of the taxpayer's income during the tax years at issue.

The taxpayer takes issue with the ATB's conclusion, but he does not really contest its underlying findings. For example, the taxpayer estimates that he was in New York "less than 135 days" per year. Maybe so, but on the record before the ATB, 135 days reflects the majority of the taxpayer's working days during the year, where the taxpayer did not work full time during the summer. Notably, the taxpayer does not contest that the Dominican job contributed the majority of his income. On appeal from the ATB we review its factual findings under a deferential standard; the question is whether the findings are supported by substantial evidence. Schussel v. Commissioner of Revenue, 472 Mass. 83, 86 (2015). The ATB's findings here were well supported, and there was no error in concluding that New York was the taxpayer's principal place of business.

3. Whether taxpayer's New York employment was "temporary." Even where New York was the taxpayer's principal place of business for the tax years at issue, he still could have deducted his New York expenses if his work in New York was "temporary." The taxpayer urges that his Dominican work so qualifies, because his contracts with Dominican were successive

one-year contracts, and because the taxpayer never was promised employment beyond one year.

The ATB rejected the taxpayer's argument that his New York job was only temporary, and the ATB's conclusion is supported by substantial evidence. The taxpayer's contention may well have had merit if applied to tax year 2006, when he first started working for Dominican on a one-year contract. By 2012, however, the taxpayer had been working in (and commuting to) New York for six years. He had purchased a condominium there in which to live. His responsibilities at Dominican had steadily increased, so that as of 2012 he was the coordinator for Dominican's history department, and in charge of the debate team. Indeed, the taxpayer was granted "tenure" in 2012 -- although he claims that tenure at Dominican did not equate to any guarantee of future employment. These facts amply supported the ATB's conclusion that the taxpayer's Dominican position did not qualify as temporary, and that his work at Dominican exceeded the one-year period set forth in the Federal statute.

The taxpayer insists that the ATB was required to find that his work was temporary, based on the duration of his one-year contracts. He asserts that "the [ATB] was not at liberty to define the employment relationship as it pleased. The [taxpayer] and his employer had already defined it by virtue of the employment contracts that they mutually signed." We

disagree. While the term of the taxpayer's contracts was a relevant consideration, the ATB could look beyond the form of the contracts when applying the applicable tax laws, to evaluate the substance of the taxpayer's employment relationship and whether it was temporary. Myhrman v. Commissioner, 50 T.C.M. (CCH) 354, 358 (1985) (employment indefinite not temporary where taxpayer performed series of short-term projects with same company over several years and renewed employment contract annually); Groover v. Commissioner, 44 T.C.M. (CCH) 103, 105 (1982) (employment indefinite not temporary where employee signed series of fifty-week contracts, noting that temporary employment may become indefinite with passage of time). Here the taxpayer's employment had been steady, and steadily progressing, for several years. There was no error.[2]

4. The deductibility of the reverse commute, from New York to Massachusetts. Finally, the taxpayer points out that even if New York were properly deemed his tax home, he nevertheless was entitled to travel deductions when he traveled from New York to Massachusetts for business, which he did frequently. The taxpayer is correct on this point; to the extent he incurred

[2] The taxpayer also argues that the ATB process was unfair, and that he was denied his civil liberties, among other reasons, because he was denied a jury trial. We have considered these arguments, and they are without merit. There is no right to a jury in tax cases. See Coleman v. Commissioner of Revenue, 791 F.2d 68, 71 (7th Cir 1986); Zora v. State Ethics Comm'n, 415 Mass. 640, 652-653 (1993).

reasonable and necessary expenses to do his business in Massachusetts -- for example, to travel once per month for his National Guard work at Fort Devens -- the taxpayer was entitled to deduct those expenses. See Andrews, 931 F.2d at 137 ("a taxpayer who is required to travel to get to a place of secondary employment which is sufficiently removed from his place of primary employment is . . . within the [travel expense deduction] [citation omitted]").

The Commissioner of Revenue (commissioner) did not respond to this argument in its appellate brief. At oral argument, the commissioner contended that the taxpayer had not properly raised the issue in his petition, nor had he substantiated the expenses reasonably incurred in traveling for business from New York to Massachusetts. Our review of the materials before the ATB indicates that the taxpayer did raise this issue during the ATB hearing; it is not clear, however, what record was made before the ATB, nor is the issue addressed in the ATB's decision.[3] We accordingly remand the matter to the ATB to address whether the taxpayer has properly raised the issue, and whether he has

[3] We note that even if the taxpayer did not properly raise or fully litigate the issue before the ATB, the ATB may address the issue if "equity and good conscience so require." G. L. c. 58A, § 7. Deveau v. Commissioner of Revenue, 51 Mass. App. Ct. 420, 427 (2001).

demonstrated reasonable and necessary business expenses for his travel from New York to Massachusetts.[4]

Conclusion. The portion of the ATB decision that denied the taxpayer's deductions for expenses related to maintaining his tax home in New York is affirmed. The matter is remanded to the ATB to determine whether the taxpayer has properly raised whether he may deduct reasonable and necessary business expenses for his travel from New York to Massachusetts, and if so, whether he has demonstrated any such reasonable and necessary business expenses.

So ordered.

By the Court (Hanlon, Kinder & Englander, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: July 16, 2019.

[4] The taxpayer seems to suggest that all his expenses regarding travel to Massachusetts would be deductible. The proper test is whether the claimed expenses were incurred while pursuing a trade or business, and reasonable and necessary to that end.

[5] The panelists are listed in order of seniority.